SUPREME COURT, U. S.

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In The

Supreme Court of the United States

October Term, 1965

No. 300

THORNTON R. AMBOLD,

Petitioner,

v.

SEABOARD AIR LINE RAILROAD COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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July 28, 1965

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I.

OPINION BELOW

The opinion below in the United States Court of Appeals for the Fourth Circuit has been printed since the petition for writ of certiorari was filed and is reported at 345 F. 2d 30 (4th Cir. 1965).

II.

JURISDICTION

The jurisdictional requisites are properly and adequately set out in the petition for writ of certiorari.

III.

THE QUESTION PRESENTED

The sole question presented by the petition is whether the trial judge, the Honorable Sterling Hutcheson, of the United States District Court for the Eastern District of Virginia at Richmond, and the United States Court of Appeals for the Fourth Circuit erred in holding that there was insufficient evidence to support a verdict obtained by petitioner, hereafter called Mr. Ambold, against respondent, hereafter called the Railroad, in a Federal Employers Liability Act case.

IV.

STATEMENT OF THE CASE

Unlike most Federal Employers Liability Act cases, there is no real conflict in the testimony here. Indeed, there were no eyewitnesses to Mr. Ambold's injury, a fall he sustained on April 8, 1961, while working in the Railroad's diesel shop in Richmond, Virginia, so his own testimony as to how his accident occurred is uncontradicted and served as a basis for the action of the Court of Appeals in affirming the Trial Court's action in setting aside his verdict. Despite the lack of conflict in the testimony we will restate it to arrange it in an orderly fashion for purposes of argument.

1. Mr. Ambold's Own Version of His Fall

Mr. Ambold was first employed by the Railroad in 1942. He had been doing exactly the same job he was doing on April 8, 1961, for fourteen or fifteen years (Tr. 28). That day, as for many years previously, Mr. Ambold was employed at the Railroad's Hermitage Yards in Richmond, Virginia, as a machinist in the diesel shop. His duties consisted of checking air brakes on diesel locomotives.

Just before lunch that day Mr. Ambold was on board Diesel No. 1922, checking its air brakes. The locomotive was in a stationary position parallel to a raised wooden platform, called the shop platform. The locomotive has a metal, corrugated catwalk running alongside the engine with stanchions running vertically from the catwalk to the handrail above it. From the edge of the catwalk to the shop platform is eleven inches. At the end of the locomotive is another corrugated metal walkway called the diesel platform. The catwalk, the diesel platform, and the shop platform were level with one another, designed so that workers need not climb up and down while carrying tools to gain ready access to the locomotive. According to Mr. Ambold, it is 32 inches from the diesel platform to the shop platform across the stepwell (Tr. 7).

Although the stepwell is 32 inches across, and about two feet wide, there is a handrail on each side of the stepwell. On the left side the handrail runs along the catwalk until it intersects at a right angle with the stepwell and is, consequently, eleven inches from the shop platform and twenty-one inches from the beginning of the stepwell. Since it intersects at a right angle, it does not parallel the stepwell. On the right side there is a handrail which does parallel the stepwell and descends as the steps in the stepwell do (Pl. Ex. 1, Tr. 48).

After he finished checking the locomotive Mr. Ambold went to the diesel platform at the end of the locomotive to step off onto the shop platform for lunch. As he stepped from the locomotive platform across the stepwell, he slipped and fell to the concrete shop floor beneath. He had nothing in his hands at the time he fell (Tr. 31).

Mr. Ambold testified very frankly and fairly why he fell (Tr. 35, 36, 46):

"Q All right. Now, why did your foot slip?

"A Just didn't go far enough on the platform.

"Q In other words, you didn't make a long enough step, is that right?

"A I misjudged.

* * *

"Q You just didn't take a long enough step?

"A That's right."

2. The Scene of the Fall

Immediately after his fall, Mr. Ambold reported the incident to Lyman E. Jarratt, his foreman. Shortly thereafter Mr. Jarratt went to the scene of the accident, inspected it, and found no grease or oil or anything else on the shop platform (Tr. 131). Mr. Ambold also testified there was no foreign matter on his shoe, on the platform, or anywhere around (Tr. 36).

Lighting conditions in the diesel shop were good that day. Mr. Ambold testified that the weather was good and that he had no difficulty seeing where he was going (Tr. 36, 37). Mr. Jarratt testified that the lighting, which came from both the skylight overhead and the open door at the end of the pit, was good (Tr. 131).

3. This Was a Unique Accident

Although Mr. Ambold had been taking the same step, day after day, fifty or seventy-five times a week, for years prior to his fall, he had never fallen before (Tr. 30, 31). When Mr. Ambold returned to work after his fall he continued to take the same step just as frequently for another two and a half years, and he never fell again (Tr. 30, 31). Neither before or after his fall did Mr. Ambold make any complaint about having to take the step, nor did he make

any suggestions about using a ramp across the opening between the diesel platform and the shop platform when taking the step (Tr. 37).

Mr. Jarratt, the diesel shop foreman, an employee of the Railroad for fifty-one years, testified that never before or since in his experience in the diesel shop had anyone fallen while taking the same step from a locomotive to the shop platform, a step his machinists take fifty or more times a day. No one has made any suggestion to him, either before or after Mr. Ambold's fall, that ramps should be provided for use of those stepping from a locomotive to the shop platform (Tr. 133, 134).

4. The Work in Jacksonville Was Different

Mr. Ambold offered evidence, over objection, to show that metal ramps were used to get to and from locomotives and the shop platform in the Railroad's shops in Jacksonville, Florida. The evidence showed, however, that the situation in Jacksonville was completely different from the situation in Richmond. Only Mr. L. A. Ellis, another machinist employed by the Railroad, testified about the Railroad's Jacksonville shop. He testified that the metal ramps were placed inside the metal stanchions which run along the locomotive's catwalk up to the handrail and that machinists in Jacksonville used the ramps inside the stanchions under the handrail to go back and forth between the shop platform and the locomotives (Tr. 73, 74).

Mr. Ellis also testified that machinists did not go under the stanchions in Richmond, although the distance in going that way to the shop platform was only eleven inches, because they would have to duck down to get beneath the handrail (Tr. 70).

Mr. Ellis testified that dead work, that is, work requiring twenty-four or more hours to complete, is done in the Rail-

road's Jacksonville shop. This work involves, among other work, dismantling locomotive engines and taking off heavy parts and removing them from the locomotive to the shop platform. The parts were handed across the ramp or, if they were heavy enough, pushed or slid across the ramp to the shop platform. Machinists working on dead work in Jacksonville from time to time carry tools across the ramps also (Tr. 91-95).

By contrast, only minor repairs, those requiring between one and eight hours to complete, are done in the diesel shop in Richmond. Dead work, requiring more than eight hours to complete, is done in the roundhouse or in the yard (Tr. 94-96, 101).

Finally, the shop platform in Richmond is substantially closer to the locomotive than it is in Jacksonville. In Jacksonville the opening between the shop platform and the locomotive is six to eight inches or 20-25 per cent wider than in Richmond (Tr. 90).

5. The Expert Testimony

Mr. Ellis was permitted to give his opinion whether the step Mr. Ambold was taking when he fell was hazardous. At first Mr. Ellis said that if a person were not extra cautious he would slip and fall in taking the step, although Mr. Ellis acknowledged he himself had taken the step on numerous occasions and had never fallen or made complaint about it (Tr. 77, 100). Mr. Ellis went on to say, however (Tr. 96, 97):

"Q Now, just a moment ago you said that whether this was a hazardous step or not would depend upon the time of day and the lighting, did you not?

"A That's true.

"Q All right. Now, explain to us when this would not be a hazardous step.

"A Like that light there now that you have up there that's illuminating this floor which we have overhead, if it's a good light there, you can see. But if that light is out, you cannot see.

* * *

"Q All right, if it's a light day outside and it is the middle of the day, is there anything hazardous about making this step?

"A No, I wouldn't say it was."

Mr. Ellis was furloughed from the Railroad at the time of Mr. Ambold's accident and consequently knows nothing about the circumstances surrounding it (Tr. 91, 95).

V.

ARGUMENT

1. The Railroad Was Not Guilty of Negligence Which Caused or Contributed to Mr. Ambold's Injuries

We agree that since the decision in *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500 (1957) it has been clear that if employer negligence played any part, even the slightest, in a railroad employee's injury, a jury question is presented under the Act. This does not mean, however, that a plaintiff is relieved of the burden of proving some act of negligence on the part of the railroad. As the court pointed out in *Dessi* v. *Pennsylvania R. Co.*, 251 F. 2d 149 (3d Cir. 1958), *cert. den.* 356 U.S. 907 (1958), in discussing the *Rogers* case, at p. 151:

> "This language [in the *Rogers* case] indicates that the role of a defendant's negligence in helping bring about the injury may be small. It does not suggest that

an F.E.L.A. plaintiff can carry his burden of proof without evidence that the role was real. Indeed, the paragraph containing the quoted sentence continues with this observation:

> "'Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the inquiry or death. . . .'
>
> "The repeated use of the phrase 'with reason'—it appears three times in this short paragraph—is a persuasive indication that the court intended no departure from the familiar and normal requirement of our own jurisprudence, as repeatedly stated in its own rather recent decisions, that the party with the burden of proof must 'present probative facts from which the negligence and the causal relation could reasonably be inferred. . . .'"

Therefore, Mr. Ambold had the burden of proof to show that the Railroad was negligent and that its negligence contributed to his injuries. Here Mr. Ambold contends the Railroad was negligent in failing to furnish him a safe place to work. He makes no other contention of negligence, nor can he.

But the Railroad's duty was only to furnish him a reasonably safe place to work, not an absolutely safe place to work. As the court recognized in *Atlantic Coast Line R. Co.* v. *Craven,* 185 F. 2d 176 (4th Cir. 1950), *cert. den.* 340 U.S. 952 (1951), at p. 178:

> "An employer has the duty to provide his employees a safe place to work, but this duty cannot be absolute. Dangers are implicit in such occupations as railroading, and railroads are not insurers of their employees. . . ."

Merely asserting that the Railroad did not furnish him a safe place to work is not evidence either that it did not furnish a safe place to work or of negligence. Mr. Ambold's theory of liability is that the Railroad was negligent in requiring him to take a step of thirty-two inches from the locomotive to the shop platform. While counsel for Mr. Ambold consistently refer to the space as being from thirty-one to thirty-five inches, that distance is an estimate made by Mr. Ellis, who was not even employed by the Railroad at the time. Mr. Ambold testified that the distance was thirty-two inches, no more, no less, and he was the only eyewitness and should know.

Mr. Ambold makes no contention that the area was poorly lighted or that the platform was slippery or uneven. To the contrary, it affirmatively appears from the evidence that the area was well lighted and that there was no grease or any other foreign object on the platform. The shop platform was level and was at the same height as the locomotive platform from which Mr. Ambold was stepping when he fell.

Counsel for Mr. Ambold argue in their petition that the evidence did not show whether the windows and the skylight in the shop were clean or dirty. But Mr. Ambold's own testimony is that the area where he was working was well lighted. Certainly the burden is not upon the Railroad to prove that the windows and skylight were clean when there is no evidence they were dirty, and the uncontradicted evidence is that the area where Mr. Ambold fell was well lighted.

Only if a thirty-two inch space to be crossed, with handrails available at approximately midpoint on each side of the space, in and of itself is not a reasonably safe place to work did the trial court commit reversible error in setting

the jury's verdict aside. The standard Army marching pace is thirty inches: distances are generally paced off in roughly yard lengths. A thirty-two inch step is simply not strained or unusual in any sense of the word, even less so here because of the availability of handrails to assist one in crossing the gap. Mr. Ambold was furnished a reasonably safe place to work. The only evidence he offers to the contrary is the mere fact that he fell, and the mere happening of an accident is not evidence of negligence, *Atlantic Coast Line R. Co.* v. *Collins,* 235 F. 2d 805, 807 (4th Cir. 1956), *cert. den.* 352 U.S. 942 (1956).

This same space has been crossed safely by Mr. Ambold and his fellow workers literally hundreds of times a week both before and after Mr. Ambold's fall. No one else has ever fallen before or since. No one has made complaint to the Railroad that the crossing was dangerous in any sense. The situation does not suggest danger, and there are no facts in evidence from which the Railroad could possibly have anticipated any danger.

In *Inman* v. *Baltimore & Ohio R. Co.,* 361 U.S. 138 (1959), the decision of this Court closest in point to the case at bar, the plaintiff, a railroad flagman at a grade crossing in a city, was struck by an automobile at night while stopping traffic at the crossing. The plaintiff contended the railroad had failed to furnish him a safe place to work. The Court of Appeals of Ohio reversed a jury verdict for the plaintiff upon the ground that no negligence on the railroad's part had been shown.

This Court, by divided vote, affirmed. This Court said, at pp. 140, 141:

> "... In measuring Ohio's disposition of the case here by the *Rogers* yardstick, we must affirm. The Act does not make the employer an insurer. Here petitioner had

> been working at Bettes Corners for seven years, performing these same duties under like circumstances and, for some three years, on this identical midnight shift. No accidents had occurred during that long period. In light of this background, we believe that the evidence here was so thin that, on a judicial appraisal, the conclusion must be drawn that negligence on the part of the railroad could have played no part in petitioner's injury.
>
> ". . . The burden of proving that the crossing was an unsafe place to work was on petitioner. It depended on some type of testimony showing the hazards at the crossing. There is no evidence of complaint to the railroad, nor is there testimony of similar occurrences in the record. . . ."

The evidence in the case at bar goes even further than the evidence in the *Inman* case. In the *Inman* case there was no evidence of any complaint to the railroad and no evidence of any similar occurrences. Here, in addition, there is affirmative, uncontradicted evidence that, although this step had been taken literally thousands of times, both before and after Mr. Ambold's fall, no one else had ever fallen. There is affirmative, uncontradicted evidence that no one, not Mr. Ambold, not Mr. Ellis, his safety expert, nor anyone else, ever complained about the step. Mr. Ambold's fall was certainly not as foreseeable as was the possibility that a flagman at a grade crossing might be struck by an automobile at night; yet in the *Inman* case this Court held the evidence was insufficient to create a jury issue as to the railroad's negligence. Of necessity, then, the evidence is insufficient here, and the decisions of the two courts below should not be disturbed.

Mr. Ambold presented evidence that metal ramps were used in the Railroad's Jacksonville shops for going and

coming between freight locomotives and the shop platform there. Upon this evidence Mr. Ambold contends that the Railroad was negligent in not furnishing similar ramps for use in the Hermitage diesel shop where he fell.

But the uncontradicted evidence shows the circumstances under which the ramps were used in Jacksonville were completely dissimilar from the situation at Hermitage. In the first place, the distance from the locomotive to the platform was six to eight inches greater in Jacksonville.

In addition, the ramps in Jacksonville were not put across the stepwells but were instead placed inside the stanchions from the catwalk to the shop platform. Use of ramps in the manner used in Jacksonville would not have prevented Mr. Ambold's accident. He could have gone under the handrail (where the ramp was placed in Jacksonville) at the Hermitage Yards if he had desired, and he would have had a step of only eleven inches to cover. He did not do so, knowing he had crossed the stepwell hundreds of times in complete safety. Furthermore, his own expert witness, Mr. Ellis, testified that machinists at Hermitage would not go under the handrail because they had to duck down.

In addition, the nature of the work done in Jacksonville is completely different from the work done at Hermitage and causes and necessitates the use of such ramps. In Jacksonville dead work is performed in the shop. Heavy parts are taken on and off locomotives and are passed across to or from the shop platform. It is necessary to slide and push some of the parts, and the ramp then is essential. On the other hand, no such work is done in the diesel shop at Hermitage. Only minor repairs are made, not necessitating passing of tools or parts across to or from the shop platform. Heavy work of the type done in the shop in Jacksonville is done in the roundhouse or the yard at Hermitage.

Even if the comparison between the heavy duty work shop at Jacksonville and the inspection shop at Hermitage were valid the mere fact that some other method might have been followed at Hermitage is no evidence that the method actually followed constituted the step an unsafe place to work. The fact that some other method might have been followed is not the test, as the court so clearly recognized in reversing the plaintiff's judgment in *Atlantic Coast Line R. Co.* v. *Craven,* 185 F. 2d 176 (4th Cir. 1950), *cert. den.* 340 U.S. 952 (1951).

In that case the plaintiff, a brakeman, was injured as he attempted to cross a track blocked by a slowly moving cut of cars. He climbed upon one car and in so doing fell and lost his leg. He contended that the railroad failed to provide him a safe place to work because it should have furnished a bridge or tunnel to cross the tracks. The court applied the proper test, at p. 179:

> "... A complete rearrangement of the yard, a bridge or a tunnel, or some system of traffic regulation might have prevented this accident. The great majority of railroad accidents (including those not involving negligence) could by some means be prevented. The test is whether reasonable men, examining the circumstances and the likelihood of injury, would have taken those steps necessary to remove the danger [citations omitted]."

Applying the test the court described in the *Craven* case, there are no facts in the case at bar from which reasonable men could have anticipated the likelihood of injury so as to take steps to remove the danger. The Railroad fully complied with its duty to furnish Mr. Ambold a reasonably safe place to work, and no verdict to the contrary can be sustained.

2. Mr. Ambold's Own Negligence Was the Sole Proximate Cause of His Injuries

Mr. Ambold was a qualified, experienced machinist at the time of his fall. While he was sixty years old at the time of his fall, there is no evidence that he was physically incapacitated or restricted in any way. Indeed, to the contrary, his entire medical testimony was that he was in excellent condition at the time of his fall.

When Mr. Ambold stepped from the locomotive to the shop platform he was doing exactly what he had done, time after time, day after day, without danger or injury to him. Mr. Ambold did not attempt to explain his fall by claiming that the area was poorly lighted, or that grease or oil on his shoe, on the locomotive, or on the platform caused him to slip. Such was not the case, as he very fairly admitted. Instead he stated that he fell because he "just didn't go far enough on the platform"; he just "misjudged" his step (Tr. 35, 36, 46).

Surely the Railroad cannot be held responsible because once in a lifetime Mr. Ambold misjudged his step. He was as familiar with the step as anyone else and was as alert to any conceivable danger it presented as anyone else. He never complained about any potential danger before or after his fall. He saw no danger in the situation, for there was none.

In *Atlantic Coast Line R. Co.* v. *Collins,* above, 235 F. 2d 805 (4th Cir. 1956), *cert. den.* 352 U.S. 942 (1956), an employee claimed he was injured while throwing a switch which was hard to operate. The evidence showed, however, that neither the plaintiff nor anyone else had ever complained the switch was hard to operate. The evidence also showed the switch had worked properly on all other occasions the evening the plaintiff was injured. The court held

that the plaintiff had not proved any negligence at all on the railroad's part. The evidence in this action is largely the same; there had been no complaint about the opening, either by Mr. Ambold or by anyone else, and employees had crossed over it safely thousands of times without difficulty. Just as there was no evidence of negligence on the railroad's part in the *Collins* case, there is no evidence of negligence here.

If Mr. Ambold had not by his own testimony misjudged his step then the accident would not have happened. Suppose Mr. Ambold had been walking down a well-lighted, even, dry stairway, had misjudged his step, had missed the bottom step, and had fallen. Would the Railroad be liable there? Certainly not; the sole cause of his fall there would have been his own negligence in misjudging his step. By the same token, the sole cause of Mr. Ambold's fall here was his own negligence in misjudging his step.

3. The Facts of This Case Do Not Warrant the Granting of A Writ of Certiorari

Counsel for Mr. Ambold have cited a number of cases in which this Court has upheld a jury verdict for an injured worker in a Federal Employers Liability Act case. The most recent of these is *Davis* v. *Baltimore & Ohio R. Co.*, 379 U.S. 671 (1965).

In the *Davis* case there was a clear conflict of testimony whether the injured employee had himself negligently backed a forklift truck into an elevator shaft or whether another employee had negligently left the forklift truck unattended, allowing it to strike the employee, knocking him into the shaft. This Court held, perfectly properly, that an issue of fact was presented for a jury's determination.

On the other hand, we have cited a number of cases in this brief where this Court and other courts have held that

the evidence of a Railroad's negligence was insufficient to create a jury issue. Notable among the cases cited, because of its similarity to this case, is *Inman* v. *Baltimore & Ohio R. Co.*, 361 U.S. 138 (1959).

What the citation of authority by both parties really means is that each Federal Employers Liability Act case is decided on its own facts. Because the facts differ so from case to case, decisions in other cases are helpful in resolving a particular case only in a very general way.

This case does not present a complex or involved set of facts. There is essentially no conflict in the testimony. The only issue is whether a railroad is guilty of negligence in asking a worker, unencumbered by tools, to cross a thirty-two inch stepwell, with handrails available on both sides of the stepwell, at a well-lighted, dry, level location. Not in any view of the evidence can this amount to negligence, and the two courts below correctly concluded that there was no evidence of negligence. The facts of the case do not warrant this Court's taking its time to make a third appraisal of the evidence to determine the correctness of the trial court's action in entering up judgment for the Railroad notwithstanding the verdict.

VI.

CONCLUSION

Because this case involves only determination of a factual matter unique to it, and because the two courts below have correctly determined that issue, the petition for writ of certiorari should be denied.

Respectfully submitted,

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